

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DONALD PIERCE)	
Claimant)	
)	
VS.)	
)	
L7 CORPORATION/WILCOX PAINTING)	
Respondent)	Docket No. 1,037,572
)	
AND)	
)	
BUILDERS MUTUAL CASUALTY CO.)	
Insurance Carrier)	

ORDER

Claimant requested review of the April 1, 2009 Award by Administrative Law Judge (ALJ) Nelsonna Potts Barnes. The Appeals Board (Board) placed this matter on its summary docket as of July 17, 2009.

APPEARANCES

Chris A. Clements, of Wichita, Kansas, appeared for the claimant. Vincent A. Burnett, of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

After noting each testifying physician's opinions, the ALJ adopted the opinion expressed by Dr. Paul Stein, the court-ordered independent medical examiner, and found the claimant sustained a 13 percent functional impairment to the right lower extremity at the knee as a result of the October 13, 2006 work-related accident.

The claimant requests review of the nature and extent of his disability. Claimant maintains the ALJ should not have relied solely on the opinions of Dr. Stein just because he was court appointed. Instead, the claimant argues the ALJ should have relied on the opinion of Dr. Murati and awarded a 27 percent impairment to the right lower extremity.

Respondent contends Dr. Murati's opinion is flawed as he did not comply with the *AMA Guides* and therefore, the ALJ's Award should be affirmed in every respect.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs, the Board makes the following findings of fact and conclusions of law:

Claimant sustained a compensable injury on October 13, 2006 while he was working as a painter. He stepped on a piece of conduit, twisting his right knee. He was referred to Dr. Kenneth A. Jansson, an orthopaedic surgeon, who ultimately performed two separate procedures on the right knee. On November 30, 2006, claimant underwent a partial medial meniscectomy, partial lateral meniscectomy, chondroplasty of the lateral femoral condyle and a debridement of a torn ACL. Then, on February 22, 2007, he had an anterior cruciate ligament [ACL] reconstruction along with an Achilles tendon graft. Physical therapy was done and other than some atrophy of the quadriceps, claimant was noted to have a good recovery. In a letter Dr. Jansson assigned a 3 percent permanent partial impairment to the right lower extremity. And although it is not expressly stated, the entirety of the letter indicates that the 3 percent relates to the ACL repair.

Claimant was referred (by his lawyer) to Dr. Pedro Murati, a physiatrist, for an evaluation and opinion as to the need for further treatment. Dr. Murati examined claimant on February 6, 2008. He made certain treatment recommendations which claimant elected not to pursue. Thereafter, on March 26, 2008, Dr. Murati authored a report based upon his initial examination and opined the following:

. . . Right Knee patellofemoral syndrome with flexion contracture. According to the *Fourth Edition of The Guides to the Evaluation of Permanent Impairment*, for the right patellofemoral syndrome, using table 62 on page 83, the claimant receives 5% right lower extremity impairment. For the right partial lateral meniscectomy, using table 64 on page 85, the claimant receives 2% right lower extremity impairment. For the right partial medial meniscectomy using table 64 on page 85 the claimant receives 2% right lower extremity impairment. For the flexion contracture of the right knee, using table 64 on page 85, the claimant receives 20% right lower extremity impairment. Using the Combined Values Chart on page 322, these right lower extremity impairment. Using the Combined Values Chart on page 322, these right lower extremity impairments combine for 27% right lower extremity

impairment.¹

At his deposition, Dr. Murati testified that he had miscalculated as provided under the *Guides* during the process of drafting his rating and that claimant's impairment was a total of 32 percent, rather than the 27 percent.²

At the statutorily-required prehearing settlement conference, the ALJ elected to refer claimant to Dr. Paul Stein for an independent medical examination. Dr. Stein examined claimant on June 30, 2008 and concurred with Dr. Jansson's diagnosis of injury to the medial and lateral meniscus as well as the anterior cruciate ligament. He concluded claimant was at maximum medical improvement and warranted a permanent impairment. Dr. Stein assigned the following impairment ratings:

Permanent partial impairment of function is provided under the AMA Guides to the Evaluation of Permanent Impairment, fourth edition. In regard to the knee joint itself, the Guides indicate that one may provide impairment either on the basis of the diagnosis (table 64 on page 85) or on the basis of physical examination findings, with the examiner determining which is the more appropriate. For details refer to page 84, section 3.2i, where the Guides state "*the physician in general, should decide which estimate best describes the situation and should use only one approach for each anatomic part*". The two options in the situation are either 10% right lower extremity impairment under table 64 for partial medial and lateral meniscectomy, or 20% right lower extremity impairment under table 41 on page 78. Under that table, he would get the 20% impairment because of 10 degrees of flexion contracture whereas 9 degrees of flexion contracture would provide only 10%. This is within the errors of measurement and the 10% impairment from table 64 is applied to this individual. Further reference is made to table 37 on page 77 for measurable atrophy of the right thigh. An additional 3% lower extremity impairment is provided. Total lower extremity impairment is 13%.³

In her Award, the ALJ concluded as follows:

The court is persuaded by the opinion of Dr. Paul Stein who performed the court ordered independent medical examination. Moreover, the parties agreed to the appointment of Dr. Stein as the independent medical evaluator. Therefore, the court concludes that claimant is entitled to an award based on a 13 percent impairment of function to the right lower extremity.⁴

¹ Murati Depo., Ex. 2.

² *Id.* at 9-10.

³ R.H. Trans., Resp. Ex. 1 at 4 (Dr. Stein's June 30, 2008 IME report).

⁴ ALJ Award (Apr. 1, 2009) at 4.

Claimant appealed the ALJ's Award arguing that the ALJ blindly - and inappropriately - accepted the independent medical examiner's impairment assessment over that offered by Dr. Murati. Claimant urges the Board to reject this approach and instead, adopt Dr. Murati's opinions as to claimant's permanent impairment. In support of this contention claimant maintains the ALJ failed to explain why she accepted Dr. Stein's opinions over the other physicians who spoke to the ultimate issue of impairment.

When trying a workers compensation claim an ALJ must routinely evaluate a physician's opinions and weigh that against the other evidence contained within the record. K.S.A. 44-516 expressly compels the ALJ to consider any opinion rendered by an independent medical examiner in making the final determination. In this instance, that is precisely what the ALJ did. And in support of her decision to adopt Dr. Stein's opinion, the ALJ expressly indicated that she was "persuaded by the opinion of Dr. Paul Stein who performed the court ordered independent medical examination."⁵

The Board has considered the evidence contained within the entire record and finds the ALJ's Award should be modified. Dr. Stein's explanation as to why claimant is entitled to only a 10 percent impairment as opposed to the 20 percent he arguably qualifies for under the *Guides* is not persuasive. And that, coupled with the fact that neither Dr. Stein or Dr. Murati rated claimant's surgical repair of his torn ACL, warrants a modification of this Award. The Board, therefore, finds that claimant's true impairment lies somewhere in between the opinions expressed by Drs. Murati and Stein, or 22.5 percent to the right lower extremity. He is also entitled to the 3 percent permanent partial impairment to his knee for the ACL repair. Accordingly, claimant's Award is modified to reflect a 25 percent to the right lower extremity at the level of the knee.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated April 1, 2009, is modified as follows:

The claimant is entitled to 11.14 weeks of temporary total disability compensation at the rate of \$418.48 per week in the amount of \$4,661.87 followed by 47.22 weeks of permanent partial disability compensation, at the rate of \$418.48 per week, in the amount of \$19,760.63 for a 25 percent loss of use of the leg, making a total award of \$24,422.50.

⁵ *Id.* at 4.

IT IS SO ORDERED.

Dated this _____ day of September 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Chris A. Clements, Attorney for Claimant
Vincent A. Burnett, Attorney for Respondent. and its Ins. Carrier
Nelsonna Potts Barnes, Administrative Law Judge